FILED BY CLERK
FEB 18 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RAYMOND B., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, AYTUMN B., and KIERA B., Appellees.	2 CA-JV 2010-0093
SUSAN B., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, AYTUMN B., and KIERA B., Appellees.	2 CA-JV 2010-0096 (Consolidated) DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J18132600

Honorable Gus Aragón, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 Raymond B. and Susan B. challenge the juvenile court's order adjudicating their children Aytumn, born April 2005, and Kiera, born April 2006, dependent. They both contend there was insufficient evidence that the children had been abused or neglected and therefore insufficient evidence to support the court's order; the court erred in admitting the out-of-court statements of Susan's daughter Kaitlin; and A.R.S § 8-237 and Rule 45(E), Ariz. R. P. Juv. Ct.—the authority for admitting Kaitlin's out-of-court statements—violate due process. Raymond also contends the court erred when it considered his and Susan's conduct with respect to Kaitlin and Susan's son Joshua in determining whether Aytumn and Kiera, his biological children, are dependent as to him. We have granted appellee Arizona Department of Economic Security's (ADES) request to consolidate the appeals. For the reasons stated below, we affirm.

¶2 We will not disturb the juvenile court's order absent a clear abuse of discretion. *See In re Pima County Dependency Action No. 93511*, 154 Ariz. 543, 546, 744 P.2d 455, 458 (App. 1987). We will affirm the court's order "unless the findings upon which it is based are clearly erroneous and there is no reasonable evidence

supporting them." *In re Pima County Juv. Action No. 118537*, 185 Ariz. 77, 79, 912 P.2d 1306, 1308 (App. 1994). As the petitioner, ADES was required to prove the allegations of the dependency petition by a preponderance of the evidence. *See* A.R.S. § 8-844(C)(1); Ariz. R. P. Juv. Ct. 55(C). On appeal, we view the evidence in the light most favorable to sustaining the court's ruling. *See Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, ¶ 21, 119 P.3d 1034, 1038 (App. 2005). We do not reweigh the evidence presented at the dependency hearing because, as the trier of fact, the juvenile court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004).

¶3 A dependent child is a child "[i]n need of proper and effective parental care and control and who has no parent or guardian . . . willing to exercise or capable of exercising such care and control," or "[a] child whose home is unfit by reason of abuse, neglect, cruelty or depravity by a parent." A.R.S. §§ 8-201(13)(a)(i), (iii). Thus, contrary to the parents' assertion, the evidence did not have to show Aytumn and Kiera had been abused or neglected, only that, at the very least, the parents were not capable of properly parenting them. The record establishes that in January 2008, Child Protective Services (CPS) received a report that Raymond had physically abused Joshua, Susan's son, and learned after investigating this claim that Joshua and Kaitlin, Susan's daughter, had witnessed domestic violence in the home and that the parents seemed to have an alcohol abuse problem. In February, Raymond was arrested for domestic violence against Susan; Susan left Arizona with the children, returning to Raymond about seven weeks later.

CPS received additional reports of domestic violence in April and ADES filed a dependency petition with respect to all of the children. Although the children were removed from the home, they were returned after ADES began providing the family a variety of services designed to address the domestic violence and alcohol abuse. The juvenile court dismissed the petition as to Aytumn and Kiera in February 2009 and as to Joshua and Kaitlin in August 2009.

¶4 A few weeks later, Kaitlin reported to school officials that Joshua had hit her. Raymond and Susan called law enforcement. Joshua was arrested and ultimately placed in a group home because the parents refused to take him home with them. ADES filed a dependency petition which included allegations contained in the prior dependency petition—that Joshua had stolen a bicycle and struck Kaitlin. After Susan admitted allegations in the amended petition, including the allegation that she would not permit him to return to her home unless he received and benefitted from services, Joshua was adjudicated dependent. As discussed below, a dependency petition as to the other three children was filed in January 2010, and they were adjudicated dependent in August.

¶5 The parents' drinking typically resulted in fighting by the parents which escalated into violence. Despite being provided a variety of services designed to address their alcoholism, they continued to drink, and Joshua reported to CPS that the parents had tried to hide their drinking from the children. Over Susan's objection, in which Raymond joined, CPS investigator Lisa Hamilton was permitted to testify at the dependency hearing about abuse or neglect as to Kaitlin or "as to what might have affected her with respect to abuse or neglect under [§] 8-237." Hamilton stated Kaitlin had told her that

Raymond had physically abused Aytumn and Kiera, which scared Kaitlin; that Susan had seen Raymond discipline the younger children excessively but had not protected them; and that Raymond and Susan had started drinking again, which scared her because it previously had resulted in domestic violence. Hamilton also testified Kaitlin had stated that she was afraid and did not want to go home, and that Aytumn and Kiera had been touching each other inappropriately and "started having accidents randomly."

¶6 Hamilton eventually took custody of Kaitlin in January 2010 and filed a dependency petition; she was unable to find Raymond and Susan or Aytumn or Kiera. Without making any arrangements for Joshua or Kaitlin or letting ADES know where they were going, the parents left Arizona with Kiera and Aytumn. ADES requested an order for authorities to pick up the two children. The juvenile court granted that request and, in March 2010, a Washington Child Protective Services investigator, Anne Whitman, removed the children from a motel room where the family had been living. Susan told Whitman she had left Joshua and Kaitlin behind because she did not believe she could ever get them back, although she and Raymond denied there was an open ADES or CPS file in Arizona at the time. Aytumn and Kiera were returned to Arizona. After a contested dependency hearing was held over four days, at the end of which Susan conceded Kaitlin was dependent, the juvenile court adjudicated Kaitlin, Aytumn, and Kiera dependent, the latter two as to both parents. Susan and Raymond appealed the court's order and we have granted ADES's motion to consolidate the appeals because the parents' arguments and the evidence overlap.

¶7 At the outset, we note that the juvenile court entered findings of fact and related conclusions of law that are supported by the record. No purpose would be served by rehashing those factual findings in their entirety. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 16, 53 P.3d 203, 207-08 (App. 2002), *citing State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1994). Rather, we adopt them, specifying those findings herein as they relate specifically to the issues the parties raise on appeal.

¶8 Raymond argued below during his opening statement that the juvenile court should reject ADES's attempt "to paint a broad brush" and rely on evidence relating to his treatment of Kaitlin in deciding whether Aytumn and Kiera are dependent as to him because Kaitlin and Joshua are not his biological children and he ensured the safety of his own children. He reurges this argument on appeal and contends Susan abandoned her own children but he could not be regarded as having abandoned them as well because he had no obligation to care for them. But ADES argued at the dependency hearing, and the court found, that Susan and Raymond had acted as a "parental team" with respect to all of the children. The record supports the court's finding. The children were living with both parents. They both chose to leave Arizona because CPS had taken Kaitlin and placed her with neighbors and they were afraid CPS would take the other children. Raymond testified they parented all of the children as partners and that he and Susan decided to leave shortly after learning there might be a CPS investigation of the family. Raymond testified he understood how hurtful it was to the children to be left, yet he insisted he had no concerns about Susan's ability to parent.

¶9 We agree with ADES and the juvenile court that Raymond's lack of responsibility with respect to his stepchildren was relevant to his judgment as an adult and as a parent and therefore relevant to whether he was willing and capable of exercising proper parental care and control of his biological children. The court found Raymond and Susan had "shown extremely poor parenting skills and judgment and a lack of consistency and reliability." The evidence established that, just before Kaitlin's twelfth birthday, Susan and Raymond left her and Joshua in Arizona in ADES custody without any notice and without making any provisions for them. Raymond left his job and the couple simply abandoned their home. They left CPS without any means of contacting them. Finally, the court's order belies Raymond's contention that his conduct relating to Joshua and Kaitlan was the only evidence upon which the court based its finding and conclusion that Aytumn and Kiera were dependent. Rather, the court simply found that the parents' conduct relating to the older children "illustrated" their lack of judgment and poor parenting skills.

¶10 Both Raymond and Susan contend there was insufficient evidence to support the juvenile court's order. They assert there was no evidence the children had been neglected or abused, noting that when the children were removed from the parents' custody in Washington the motel room appeared to be clean and the children seemed to have been well cared for and, as the court found, did not appear to be "in immediate physical danger." But the court specifically noted this evidence and found, nevertheless, that the children were dependent as to both parents. It based that conclusion on factual findings that we have adopted; including the court's finding that there was a history of

domestic violence and alcohol abuse. The record also contains evidence that Raymond disciplined Aytumn and Kiera inappropriately and that Susan failed to protect them. That the children were not being neglected at the time they were taken into ADES custody does not negate the findings, express or implied, that support the court's adjudication. Nor does the fact that Kaitlin's in-court testimony differed from the statements she had made to the CPS investigator. The court noted the inconsistencies but found, nevertheless, that the statements were not materially different. We disagree with Raymond's suggestion that this conclusion was erroneous as a matter of law. Rather, it demonstrates the court was properly assessing and weighing the evidence, based on the credibility of the witnesses, to resolve conflicts in the evidence. Although the evidence was not overwhelming, we must defer to the court's resolution of those conflicts and therefore conclude there was reasonable evidence to support the court's order.

¶11 Raymond and Susan additionally argue the juvenile court erred when it admitted and considered Kaitlin's out-of-court statements, particularly the evidence regarding mistreatment of Aytumn and Kiera. Before trial, the parents filed a motion asserting Kaitlin should be compelled to testify at a dependency hearing and be subject to cross-examination. Although ADES sought a protective order, which the juvenile court granted, on the first day of the dependency hearing Kaitlin's counsel informed the court Kaitlin wished to testify. The court informed the parties the protective order would remain in effect and that only Kaitlin's counsel could call her as a witness. Kaitlin testified on the third day of the dependency hearing and was subject to cross-examination.

¶12 As we stated above, Susan and Raymond objected to the admission of Kaitlin's statements through Hamilton's testimony. But section 8-237, A.R.S., and Rule 45(E) allow for the introduction of a child's out-of-court statements if the juvenile court finds sufficient indicia of reliability. The court found the statements satisfied the threshold showing of credibility and agreed it would consider the statements with respect to the abuse or neglect of Kaitlin. We will not disturb a juvenile court's ruling on the admissibility of evidence absent an abuse of discretion. *In re Jonah T.*, 196 Ariz. 204, ¶ 15, 994 P.2d 1019, 1023 (App. 1999). We see no such abuse here. First, the court repeatedly stated it would consider Kaitlin's statements only insofar as they related to abuse or neglect of Kaitlin. And the court did not find Aytumn or Kiera had been abused, rather the court adjudicated the children dependent because neither parent was willing or capable of providing proper and effective parental care and control. The court did, in fact, appear to consider the effect on Kaitlin of being exposed to the parents' treatment of Aytumn and Kiera. That was proper use of her hearsay statements.

¶13 In any event, even assuming without deciding that the juvenile court erred, any error was clearly rendered harmless by the fact that Kaitlin ultimately testified and was subject to cross-examination. The court found her credible and did not find the statements she had made out of court to be materially inconsistent with her testimony. Additionally, there was ample other evidence establishing the domestic violence and mistreatment of Aytumn and Kiera. A CPS case worker testified that Aytumn told her how Raymond would hold her and Kiera by the neck to put them in "time-out." And

Kiera demonstrated this for the case worker. And a neighbor's child witnessed the same conduct.

¶14 Finally, we agree with ADES that the parents waived any argument that the statute and rule violated their due process rights by failing to make that argument in the juvenile court. *See Marco C. v. Sean C.*, 218 Ariz. 216, ¶ 6, 181 P.3d 1137, 1139-40 (App. 2008). Moreover, even if certain objections could be construed as sufficiently broad to preserve this issue, there was no due process violation here because, not only did the parents have notice before the dependency hearing that the statements would be admitted pursuant to the applicable statute and rule, but ultimately Kaitlin testified and was cross-examined. We find no error, much less constitutional error.

¶15 For the reasons stated, we affirm the juvenile court's order adjudicating Aytumn and Kiera dependent as to both parents.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge